

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MADELINE PETRIE</b>	)	
Claimant	)	
VS.	)	
	)	
<b>HERRMAN'S EXCAVATING, INC.</b>	)	Docket No. 248,296
Respondent	)	
AND	)	
	)	
<b>CINCINNATI INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the June 28, 2000, preliminary hearing Order of Administrative Law Judge Brad E. Avery. In the Order, claimant was denied benefits after the Administrative Law Judge found that she had failed to prove that notice was given within 10 days and had further failed to show just cause for not providing timely notice.

**ISSUES**

- (1) Did claimant submit notice to respondent of an accidental injury within 10 days as required by K.S.A. 44-520?
- (2) If claimant did not provide notice within 10 days as required by statute, was there just cause for claimant's failure to provide timely notice?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the Appeals Board finds for preliminary purposes that the Order of the Administrative Law Judge should be affirmed.

This matter comes before the Board after a second preliminary hearing. Claimant alleges accidental injury with respondent on July 26, 1999. The Administrative Law Judge initially denied claimant benefits in an Order dated December 30, 1999, finding claimant failed to provide timely notice of accident, and further failed to prove just cause for her

failure to provide timely notice as required by K.S.A. 44-520. That Order was affirmed by the Appeals Board in its Order of February 23, 2000.

At the most recent preliminary hearing, claimant submitted the testimony of claimant's coworkers, Alvin Harris and Roy Schlodder, in support of her claim of timely notice. Both Mr. Harris and Mr. Schlodder are heavy equipment operators with respondent.

Claimant argued in her brief that her coworker, Mr. Harris, saw the injury occur and even scolded her for picking up the rock immediately following the incident. While Mr. Harris testified that he did see claimant picking up large rocks and advised her not to do so, he had no recollection of claimant suffering any type of injury. Mr. Harris did recall claimant talking to Bob Smith, the supervisor, about her back hurting, but heard nothing at that time relating the back pain to a work-related injury.

Claimant also argued in her brief that Mr. Harris, as the grader operator, was responsible for "calling the shots" and had the authority to tell claimant what to do and assign her duties. That argument is a misstatement of Mr. Harris's testimony. Mr. Harris made it clear that he had no supervisory authority over claimant whatsoever. He testified that the operators would, at times, tell each other what to do, but that was in the normal course of work and allowed none of them supervisory authority over the other operators.

Mr. Schlodder, another operator with respondent, was not present when claimant was injured and was not present when claimant talked to Bob Smith about her back. He did recall hearing about claimant's injury at some time, but does not recall when he heard that or from whom the information was obtained.

The testimony of Mr. Harris and Mr. Schlodder was taken by claimant in an attempt to support her contention that she provided timely notice to respondent of accident. The testimony of Mr. Harris and Mr. Schlodder accomplished the exact opposite. Neither can verify that claimant suffered any type of accidental injury or that she advised Mr. Smith in a timely fashion that she had suffered a work-related injury. In addition, both verify that Mr. Harris, Mr. Schlodder and claimant were all of equal status as operators with no supervisory responsibilities over each other. Therefore, notice to either Mr. Harris or Mr. Schlodder would have been ineffective under the Kansas Workers Compensation Act, as notice to a coworker does not constitute notice to the respondent employer of an accident. K.S.A. 44-520.

In workers compensation litigation, it is claimant's burden to prove his or her entitlement to benefits by proving the various conditions upon which his or her right depends. The evidence submitted at the preliminary hearing of June 27, 2000, does not convince the Appeals Board that claimant provided timely notice of accident as required

by K.S.A. 44-520. In addition, the evidence does not support claimant's contention that there was just cause for her failure to notify respondent of this accident.

Therefore, the Appeals Board finds that claimant has not provided timely notice of accident pursuant to K.S.A. 44-520 and that there was not just cause for claimant's failure to so notify respondent of this accident.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order Denying Compensation from Administrative Law Judge Brad E. Avery on June 28, 2000, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2000.

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BOARD MEMBER

c: Roger D. Fincher, Topeka, KS  
Christopher J. McCurdy, Wichita, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director